

HON'BLE SRI JUSTICE ASHUTOSH MOHUNTA
AND
HON'BLE SRI JUSTICE DAMA SESHADRI NAIDU

PUBLIC INTEREST LITIGATION No.110 OF 2013

ORDER: (Per the Hon'ble Sri Justice Dama Seshadri Naidu)

I. INTRODUCTION:

1. This is an issue brought before the court ostensibly *pro bono publico* challenging the appointment of Respondent Nos.3 to 6 as State Information Commissioners (SICs or ICs) through G.O.Ms. No. 252, General Administration Department (R.T.I.A/GPM & AR) Department, dated 10.05.2012, as being contrary to the procedure laid down in Section 15 (3) (4) & (5) of the Right to Information Act, 2005 ("the RTI Act" for brevity), the principles laid down in "*Namit Sharma Vs. Union of India*" (W.P.(Civil) No.210 of 2012) dated 13.09.2012¹, by the Hon'ble Supreme Court of Indian, as well as the Constitutional mandate.

II. THE CREDENTIALS OF THE PETITIONERS:

2. To establish their credentials, the first petitioner states that he is an R.T.I Activist, having educational qualifications in Engineering and Management, with 30 years of work experience in various countries. He states that since 2006, he has taken special interest in the R.T.I and has presently devoted all his time to this Act. The first petitioner claims to be a global moderator of a particular website, which is said to be India's leading online Community Portal on the R.T.I Act. He further claims that he has guided and trained large number of people regarding R.T.I process and that he has given more than 200 guest lectures on the enactment in various forums. He also claims to have successfully argued several second appeals and complaints before various Information Commissions (ICs). The second petitioner is also said to be an R.T.I and social activist.

¹ (2013) 1 SCC 745

III. THE PLEA OF THE PETITIONERS:

3. Underlining the objective of R.T.I. Act, the petitioners have averred that the present process of selecting and appointing the State Information Commissioner (SCIC) is not transparent and lacks the element of accountability. Due to this lack of accountability, the citizen's right to know is defeated, especially since revealing the information would be detrimental to the personal and political future of the persons who appoint the State Information Commissioners, who are not willing to displease their political masters and jeopardise their future career growth. Stressing the need that the State Information Commissioner must be an independent person, the petitioners assert that he should be bold enough to take strong decisions even if it means facing up to the displeasure of the political class. It is expedient and of vital importance that the procedure is followed in course of decision making process. The channels of supervision and accountability for selecting SCICs are transparent so as to inspire confidence in the said office. It is alleged that in view of the attitude adopted by the Executive and the appointees, the citizens have felt that this empowering the act is being throttled.
4. Adumbrating the selection process as contained in Section 15 of the R.T.I. Act, the petitioners submit that, as per the wording of this provision, it is clear that SCIC and ICs should be drawn from persons of wide ranging professional backgrounds, with wide knowledge and experience in law, science and technology, social service, management, journalism and mass-media etc. It has been specifically pleaded by the petitioners that, since the persons from a variety of backgrounds are being eligible for appointment as SCIC and ICs, and since the fields include technical subjects, such as science & technology, law, etc., the committee to whom the selection is entrusted, being non-expert in nature

is not competent to assess the relative merits of the persons, whose names may be considered for appointment. Stranger and unintelligible as it may sound, the petitioners have alleged that as neither the Constitution nor the Representation of the People Act, 1951 prescribes any educational qualification for the persons to be elected to the Legislative Assembly of the State, even under R.T.I. Act, the holding of post or position or any other public office is not a prerequisite for being eligible to be appointed as SCIC and ICs.

5. The petitioners have referred to the decision of the Hon'ble Supreme Court in *Namit Sharma (supra)* and have further pleaded that as on December, 2011, the 2nd respondent Commission was consisting of only SCIC, that the first respondent/State proposed to appoint eight Information Commissioners, and that, in order to select eight Information Commissioners to the 2nd respondent Commission, the committee consisting of the Hon'ble Chief Minister and the leader of the opposition met on 31.01.2012 and concluded the selection process in a haphazard manner. It is the specific contention of the petitioners that before considering the name of the Commissioner, no advertisement was issued calling for applications. It is alleged that majority of the appointed Information Commissioners are the leaders of the ruling party for several years and some of them have been recommended by the ministers. Though many civil organizations, including the petitioners', have raised objection to the appointment of these persons, all the objections have been brushed aside without any justification. In the end it is alleged that some of the names were sent back to the Government by his Excellency the Governor with serious doubts about their eligibility.

6. In sum and substance, the grounds of challenge laid against the selection and appointment of the respondent Nos. 3 to 6 are that the

selection is contrary to the Judgment of the Apex Court in *Namit Sharma (supra)*; that the respondents No.3 to 6 have political affiliations and are not eligible for appointment as per Section 15 (6) of the R.T.A Act; that as per *Namit Sharma (supra)*, the first respondent was mandated to prepare a panel from among the applications received, after due advertisement and rational basis; that the 2nd respondent Commission shall work in bench of two members, consisting of one Judicial member and one expert, but the first respondent did not perform any exercise towards the appointment of judicial members to the second respondent Commission; and that the appointment of Information Commissioners is based on extraneous consideration and is nothing but colourable exercise of power, especially since there is no material before the Committee to give any reasonable conclusion on the eligibility of the respondent Nos. 3 to 6 in terms of Section 15 Sub Section (5) of the Act, as interpreted by the Apex Court.

7. Before concluding the pleadings of the petitioners, it may be appropriate to place on record that initially the writ petitioners instituted P.I.L No. 287 of 2012 before this court, but the same was dismissed as withdrawn, with a liberty to the petitioners to file afresh. That is how the present P.I.L has come to be filed, substantially reiterating the allegations as contained in the earlier P.I.L. More or less, the course of the present litigation has been modulated by the writ petitioners in accordance with the progress of *Namit Sharma Vs. Union of India* before the Apex Court.

IV. A NOTE ON NAMIT SHARMA CASE:

8. As heavy stress has been laid by both the parties on *Namit Sharma v. Union of India*; *ipso facto*, we are required to refer to it frequently during the course of this judgment, it well serves the purpose if we add a note of explanation to the said case.

9. In *Namit Sharma (supra)* the Supreme Court has dealt with the constitutional validity of sections 12 (5) & (6) and 15 (5) & (6) of the RTI Act, 2005 which deal with the pre-requisites for the appointment of the Information Commissioners at Center and States respectively. Through its judgment, dt.13-09-2012, the Supreme Court has partly allowed the writ petition holding that the provisions of Sections 12(5) and 15(5) of the RTI Act are constitutionally valid, but they have been read down. In sum and substance, the judgment is to the following effect: (i) the Central Government and/or the competent authority shall frame all practice and procedure related rules to make working of the Information Commissions effective and in consonance with the basic rule of law, and such rules are required to be framed with particular reference to Sections 27 and 28 of the Act within a period of six months; (ii) the persons to be nominated in terms of Section 15 of the Act preferably should be the persons possessing a degree in law or having adequate knowledge and experience in the field of law; (iii) the Information Commissions at the respective levels are to work in Benches of two members each, one of them being a "judicial member", while the other an "expert member"; (iv) a person who is or has been a Judge of the High Court is to be preferred for appointment as Information Commissioners; (v) the Chief Information Commissioner at the Centre or State level shall only be a person who is or has been a Chief Justice of the High Court or a Judge of the Supreme Court of India; and (vi) the appointment of the judicial members to any of these posts shall be made "in consultation" with the Chief Justice of India and Chief Justices of the High Courts of the respective States, as the case may be.

10. In course of time review petitions were filed under Article 137 of the Constitution of India for review of the judgment dated 13.09.2012. The said review petitions came to be allowed on 03-09-2013.

11. In review, the Supreme Court has held, (i) that Sections 12 (5) and 15(5) of the Act are not ultra vires the Constitution; (ii) that Sections 12 (6) and 15 (6) of the Act do not debar a Member of Parliament or Member of the Legislature, or a person holding any other office of profit or connected with any political party, etc., from being considered for appointment, but after such person is appointed, he has to discontinue as Member of Parliament or Member of the Legislature, etc.; (iii) that persons of eminence in public life with wide knowledge and experience in the fields mentioned in Sections 12(5) and 15(5) of the Act be considered for appointment; (iv) and that wherever Chief Information Commissioner is of the opinion that intricate questions of law will have to be decided in a matter coming up before the Information Commission, he will ensure that the matter is heard by an Information Commissioner who has wide knowledge and experience in the field of law.

12. In view of the above fact scenario, throughout the judgment, for the sake of convenience, we have referred to the judgment dt.13-09-2012 in *Namit Sharma* as *Namit Sharma (1)* and to the review judgment, dt.03-09-2013 as *Namit Sharma (2)*, as reported in 2013(11) Scale 85.

V. THE CONTENTIONS OF THE RESPONDENTS:

13. Contesting the case of the petitioners, the respondents Nos.1 and 3 to 6 have filed their counter affidavits along with certain material papers. The first respondent/State filed its counter affidavit, denying all the allegations that have been set out by the petitioners questioning the selection process adopted by the State with regard to the appointment of the Information Commissioners. Countering the allegation that those Information Commissioners who have been appointed by the State will

always try to please their political masters, the first respondent has stated that the Information Commissioners do act independently as per the provisions of the R.T.I. Act, and that it is not the State information Commissioners, who are expected to reveal the information, but it is the responsibility of the Public Information Officers or the public authorities under the R.T.I Act to provide the information to the information sakers. It is asserted that there are channels of redressal in case the Public Information Officer fails to furnish the information. The State Information Commissioner acts as an independent authority; and therefore, the allegation that those authorities would obstruct the information is totally false.

14. It is further stated that the selection committee, while making a recommendation in the meeting held on 31st January, 2012, considered the candidature of 153 applicants, including the applications of respondent Nos. 3 to 6, that the committee examined in detail the bio-data of all the applicants with reference to their background, experience and competence in the respective domain, that after going through the details and background of the applicants and after assessing the comparative merit and experience, the committee chose respondent Nos. 3 to 6. The allegations as to the alleged political activities of respondent Nos. 3 to 6 have no merit, that even the Hon'ble Supreme Court of India in *Namit Sharma (2)* clearly held that the political activities of the appointees could not be a ground for holding them to be disqualified to be appointed to the post of Information Commissioners as the same shall have effect post appointment, that the Hon'ble Supreme Court of India has never held that the selection committee is not a competent authority to assess the relative merits of the applicants before it, and that his excellence the Government of Andhra Pradesh was

pleased to approve and appoint four persons as State Information Officers, i.e., the respondent Nos. 3 to 6 herein.

15. It is stated that even with regard to the remaining four Information Commissioners, whose appointment is not the subject matter of the present P.I.L, the State has followed the directions of this Court in W.P.No.23577 of 2012 and issued orders in G.O.Ms.No.75 dated 06.02.2013. The first respondent has also placed on record the subsequent developments that have taken place before the Hon'ble Supreme Court in the case of *Namit Sharma (1)*, which was reviewed by the Apex Court. Accordingly, the first respondent has prayed that the contentions of the petitioners are without any merit and are require to be rejected.

16. In course of time, owing to subsequent developments, the first respondent has filed an additional Counter affidavit, chiefly with an intention to bring on record the order dated 03.09.2013 passed by the Hon'ble Supreme Court of India reviewing *Namit Sharma (2)*, referring the *in extenso* to the pronouncements of the Supreme Court in review. The first respondent has pleaded that in Section 15 of the R.T.A Act, there is no provision for advertisement or for wide publicity inviting applications from suitable candidates. It is stated that the respondent Nos. 3 and 5 are retired I.P.S Officers and the respondent No.4 is retired I.F.S Officer. They being former bureaucrats, they do not have any political allegiance. In the light of *Namit Sharma (2)*, the allegation that there was no prior advertisement calling for application falls to the ground. In fact, all the allegations of the petitioners stand squarely answered by *Namit Sharma (2)*.

17. In his counter the third respondent, apart from adopting the line of defence of the first respondent, has further stated that the petitioners

have made very vague allegations in a casual manner without sufficient evidentiary backing. It is asserted that as a Civil Servant, the third respondent has had an exemplary track record, having held many responsible positions and having served the State with distinction, that he has all the requisite qualifications to be appointed Information Commissioner, and that the submission of his application, the scrutiny thereof and the eventual appointment have all been in accordance with law. The third respondent is stated to have wide knowledge in administration and governance, with nearly 34 years of work experience, that in the light of the fact that the Constitutional validity of the provisions of R.T.I Act has been upheld by the Apex Court, it does not lie in the mouth of the petitioners to travel beyond the very statutory requirement and make *frivolous* allegations. He has specifically denied any political affiliations to any party and has submitted that all the pleas raised by the petitioners stand squarely answered in *Namit Sharma (2)*.

18. Without further proliferation of the pleadings, it may be stated that the respondent Nos. 4 and 5 have also taken similar pleas as their career graphs and track records do travel on parallel lines.

19. The sixth respondent contends that the present P.I.L has come to be filed by the petitioners solely on the basis of the judgment in *Namit Sharma (1)*, that in view of the subsequent review, all the pleas taken by the petitioners have fallen to the ground, that when the initial petition was dismissed as withdrawn on 03.09.2012 with a liberty to file afresh, the petitioners deliberately delayed approaching the Court with a fresh set of pleadings, and have chosen to file the present P.I.L. belatedly only with a view to preventing the respondent commissioners from discharging their duties. It is stated that the allegations are omnibus, nothing having been specifically attributed against the 6th respondent. Referring to his career

graph, the 6th respondent has stated that he is the erstwhile editor of a leading Telugu daily news paper, with a career span of 25 years, that he has authored and published innumerable articles on contemporary social issues, apart from penning many features, sketches, poems and biographies of famous personalities from various walks of life, that he has worked as a guest faculty in universities and institutions of repute, that he has been active as a social and political commentator through various news channels, both print and electronic, and that he has worked as office bearer of various news organisations, such as Andhra Pradesh Editors Guild. He has pleaded that the petition lacks *bona fides* and is required to be dismissed with exemplary costs.

VI. ADDITIONAL MATERIAL FILED BY THE PETITIONERS:

20. It is of some interest to note that, based on the pleadings extracted above, when the learned counsel for the petitioners has begun his submissions before us, he has brought to our notice a bunch of additional material papers said to have been filed by him on an earlier occasion, sans any supporting petition accompanying the said material papers. Though the learned counsel appearing for all the respondents have protested in unison that they have not been aware of those material papers, since they have not been supplied to them, and that the petitioners ought not to be allowed take them surprise. In reply, the learned counsel for the petitioners has submitted that all the information attached is in the public domain or that it has been obtained through recourse to the provisions of the very R.T.I Act; and as such, the respondents could not make any grievance about his filing that material before this Court.

21. A perusal of the material shows that it chiefly comprises the proceedings concerning the appointment of the respondent Information

Commissioners, their applications, their affidavits prior to their selection, and other related information. Notwithstanding non-supply of the material to the respondents, we did not deem it desirable to hold back the proceedings with a direction to the petitioners to bring the said material on record after due notice to the respondents. Even after admitting the veracity of the material in question, we regret to note that it is not going to have an impact on the ultimate decision being rendered in this *lis*. With this observation, we may proceed further.

VII. SUBMISSIONS OF THE PETITIONERS:

22. The learned counsel appearing for the petitioners has initially taken us through Section 15 of the R.T.I Act and has made strenuous efforts to impress upon us that the appointment of respondent Nos. 3 to 6 was in gross violation of the said provision. He states that on 26.11.2010, the first respondent/State decided to appoint two more Commissioners, but the process could not be completed till 28.02.2012. On 31.01.2012 a meeting was held in the Hon'ble Chief Minister's Chamber, where all the members of the committee, including the leader of the opposition, met for a very brief while. After exchanging pleasantries, in a matter of 10 minutes, the very crucial selection and appointment of the Information Commissioners was decided over a cup of coffee. He has stated that though the initial intention of the Government was to appoint only two Information Commissioners, the list eventually swelled to eight members, who came to be appointed in a most arbitrary manner. The learned counsel has urged that the first respondent did not have any, not to speak of sufficient, information at its disposal concerning the candidates to take proper decision after due application of mind.

23. The learned counsel for the petitioners wanted the court to believe that, only with sketchiest information being available, the first respondent

went ahead to complete the process of appointment of the Information Commissioners, actuated by extraneous considerations. Referring to respondent Nos. 3 and 4, the learned counsel has submitted that they were in public service at the time they were appointed; further their applications were not processed through proper channel. It is the contention of the petitioners that some of the appointees tendered their resignations only after their selection to the posts of Information Commissioners. The learned counsel has reiterated similar allegations against the 5th respondent as well. It is, in fact, contended that the 5th respondent retired from public service on 20.12.2010 and applied to the post in question on 05.02.2011. He was appointed Information Commissioner within three months from the date of his ceasing to be a public servant.

24. The learned counsel for the petitioners has tried to impress upon us by strenuously contending that for about two years there was only the Chief Information Commissioner (CIC) without any additional member to complete the quorum. Despite the dire need to have new members appointed expeditiously, for the reasons not known to the petitioners, the Government remained insouciant till the respondent Nos. 3 to 5 retired from service. It is the contention of the petitioners that only with a view to accommodating the said respondents, the Government deliberately delayed filling up the vacancies, even though this inexplicable inaction has resulted in defeating the provisions of the very enactment.

25. Concerning the 6th respondent, the learned counsel for the petitioners has drawn our attention to some of the letters (filed in the bunch of additional material papers) said to have been addressed by him to the Hon'ble Chief Minister, recalling his association with the ruling political party, and his contribution in propagating the principles and

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policies of the said ruling party, apart from extolling certain political functionaries therein. Putting his submissions in perspective, the learned counsel for the petitioners has contended that the R.T.I Act is meant to act as a check on the administrative operations of the executive, but, given the loyal career background and political proclivity of respondent Nos. 3 to 6, their functioning cannot be unbiased, and as such, the very laudable objective of R.T.I stands defeated.

26. The learned counsel for the petitioners has read out the statement of objects and reasons of R.T.I Act and has further specifically referred to Section 15 (5) of the R.T.A Act to re-emphasise, what is in his view, the violation of procedural parameters. To begin with, the learned counsel has contended that there was no advertisement issued calling for applications from the suitable candidates, nor was there any proper dissemination of information regarding invitation of applications. Due to lack of information, most of the eligible candidates, it is contended, have remained ignorant about the selection process, and have thus missed out on the opportunity of being selected, despite their ability and eligibility. The learned counsel has also submitted that the Government has decided to appoint more number of Information Commissioners than required and it was done only with a view to accommodating the loyal supporters of the ruling party.

27. Concluding his submissions, the learned counsel for the petitioners has urged the Court to quash and set aside the appointment of respondent Nos. 3 to 6, as was done by this Court in another instance through its order dt.12.09.2013 in P.I.L.Nos.28 and 38 of 2013 relating to four other Information Commissioners.

VIII. SUBMISSIONS OF THE RESPONDENTS:

28. Sri P. Sreedhar Reddy, learned Special Government Pleader, while making his submissions, has raised a preliminary objection with regard to, what are in his view, grossly inadequate pleadings on the part of the petitioners. The learned Special Government Pleader (SGP) has drawn our attention to the fact that none of the submissions made by the learned counsel for the petitioners across the bar finds place in the affidavit filed by the petitioners. When this court has reminded the learned SGP that public interest litigation is not adversarial in nature and that the Government is expected to answer all the questions raised by the petitioners *de hors* pleadings, if the Court is satisfied that the issues raised by the petitioners has relevance, the learned SGP, in his reply, has stated that the Government is not shying away from placing any information or record before the Court, if required. He has stated that the only concern of the Government is that they cannot be taken by surprise by raising issues only during the course of arguments, thus leaving no time for the Government to answer the said questions, by placing before the court the relevant information in support thereof. The alacrity of the State is well taken note of.

29. Referring to the allegation of the petitioners that the State Information Commissioners were hand-picked to conceal more and to reveal less information, since revealing the information would be detrimental the personal and political future of the persons who appointed the said Commissioners, the learned SGP has submitted that these allegations are unfounded, baseless and irresponsible. When the selection committee has followed the procedure to a perfection in appointing the Information Commissioners, attributing motives without any basis betrays the petitioners' sheer irresponsibility and insensitivity. It is

stated that the Information Commissioners are called upon to decide the issues only as a last resort, for the information seekers have to initially approach the information officers of the respective departments in the first place; and subsequently, if they do not get any information, they have further opportunity of approaching the departmental appellate authority. As such, making sweepingly wild allegations that the Information Commissioners will be blocking or stalling the entire information is totally unfounded.

30. Answering the allegation that there was no advertisement calling for the applications, the learned SGP has drawn our attention to sub-section (5) of Sec. 15 of the Act and has reiterated the fact that such a requirement is beyond statutory mandate, inasmuch as Section 15 of the Act has not imposed any such condition of either advertisement or of wide publicity in inviting applications. He has stated that in the case of *Namit Sharma (2)*, the Hon'ble Supreme Court has read down Section 15 and held that lack of advertisement or propagation cannot be held to be vitiating the process of selection.

31. The learned SGP has further referred to Para 5 of the Additional Counter Affidavit filed by the first respondent and has stated that since the Hon'ble Supreme Court has recalled its Order dated 13.09.2012 in the case of *Namit Sharma (1)* and later issued guidelines through its review order dated 03.09.2013 in *Namit Sharma (2)*, all the contentions of the petitioners fall to ground. In fact, each and every allegation of the petitioners, it is contended, stands answered by the Judgment of the Supreme Court in review. The learned SGP has hastened to add that the Government is not merely taking shelter under the judgment in *Namit Sharma (2)*, but, having been backed by proper record, has followed the procedure and has appointed the most eminent to the posts, keeping in

view the interest of the public foremost. Even with regard to the allegation that there was no advertisement or proper spreading of information with regard to calling for applications, the learned SGP has submitted that in total 153 applications were received and thus the selection was made from a wide range of applicants. He states that the receiving of huge number of applications by the State squarely answers the allegation concerning the alleged lack of information about the selection.

32. Before concluding his submissions, the learned SGP has urged that since the Government has acted *bona fide* and has followed the procedure without fail, the Public Interest Litigation has no merit and it requires to be dismissed with exemplary costs, as the petitioners appear to be interlopers making wild allegations without showing any sensitivity to the reputation of the respondents.

33. Sri A. Satya Prasad, the learned Senior Counsel appearing for the respondent No.6, apart from adopting the submissions made by the learned SGP, has further drawn our attention to the previous P.I.L.No.288 of 2012, which was filed and which was subsequently withdrawn on 03.09.2012 by the petitioners. He has submitted that to the earlier Public Interest Litigation, the 6th respondent was not made a party, and that having initially no grievance against his appointment, subsequently in the present P.I.L, which was filed based on the leave granted by this Court while dismissing the P.I.L.No.288 of 2012 as withdrawn, the petitioners have chosen to add him and make most frivolous allegations against him. The learned Senior Counsel has stated that the present P.I.L was filed on 22.03.2013, modelling all the pleas after *Namit Sharma (1)*. Thus, in the learned Senior Counsel's view, the petitioners have focussed more on the findings given by the Hon'ble Supreme Court in *Namit Sharma (1)*, and have tried to make out a case, but without reference to the fact scenario

of the present case. Only to cover up the deficiencies, now the learned counsel for the petitioners has made all extraneous and unfounded allegations against the respondents, without any reference to pleadings as contained in the affidavit filed in support of the petition. The learned Senior Counsel has brought to our notice that prior to filing of P.I.L, the petitioners in the name of certain rights organisation, namely "Samachara Hakku Aikya Vedhika", have submitted representations to various authorities, including his Excellency the Governor, but nowhere have they made any specific allegation against the 6th respondent. It is therefore contended that by the date of filing of the said P.I.L, there was no grievance so far as the appointment of 6th respondent, and the lapses, if any, are only with regard to the selection procedure adopted by the Government in appointing the Information Commissioners. The learned Senior Counsel has presented a brief career sketch of the 6th respondent, and stated that he is eminently suitable to be appointed the Information Commissioner. In the end, the learned Senior Counsel has submitted that the P.I.L has no merit, deserving any indulgence of this Court and thus it is required to be dismissed with exemplary costs.

34. Sri Siva, the learned counsel appearing for the 3rd and 5th respondents, apart from adopting the submissions made by Sri Sridhar Reddy, the learned SGP, and Sri Satya Prasad, the learned Senior Counsel, has further supplemented their submissions by stating that the process of appointment of the Information Commissioners was completed on 11.05.2012. Based on this information, he stressed that the respondent Nos. 3 and 5 had already resigned to their post by 11.05.2012. Answering the allegation of office of profit, the learned counsel has submitted that the question of appointee not holding an office of profit shall be considered post appointment but not otherwise. If it is to be held that no

person shall hold an office of profit even by the time he makes an application, it leads, in the learned counsel's view, to absurd consequences, as no eminent person would be able to apply, for it is hard to think that persons of eminence would not be holding any post of profit until they apply to the post of Information Commissioner. He has submitted that the State has followed the procedure as mandated under sub-sections (5) & (6) of Section 15 and has completed the process of appointment without room for any bias or exploitation.

35. The learned counsel has referred to para 14 of the judgment, dt.12.09.2013, of this Court (Division Bench) in P.I.L.Nos.28 and 38 of 2013 and has stated that the appointments were made in tune with the observations contained in the said paragraph. In fact, concerning the appointments of the Information Commissioners, whose appointment was questioned in P.I.L.Nos.28 and 38 of 2013, the Division Bench of this Court, taking note of the judgment of the Supreme Court in review in *Namit Sharma (2)*, has directed the State to follow the procedure as has been mandated by the Apex Court and to complete the selection process within a period of six weeks.

36. In the end, the learned counsel for the respondent No.3 & 5 has submitted that the P.I.L has no merits and it accordingly deserves to be dismissed with exemplary costs.

37. Heard the learned counsel for the respective parties and perused the record.

IX. THE ISSUES:

38. Shorn of extraneous particulars, the grievance of the petitioners runs in a narrow conspectus. All the allegations, whether reflected in the pleadings or made during the course of making submissions across the

bar, chiefly concern themselves with only one aspect - the alleged procedural violation in appointing the Information Commissioners. The Supplementary aspect that may have to be considered is the question of bias attributed to the respondent Nos. 3 to 6 on the grounds of fealty.

39. Thus, summarising the submissions of the petitioners, we may have to address the following issues namely:-

- i) Whether the selection and appointment of Information Commissioners without advertisement and without preparation of panels are violative of the ratio laid down by the Apex Court in *Namit Sharma* (1)?
- ii) Whether the appointment of the respondent Nos. 3 to 6, who are allegedly connected with a certain political party, is not in accordance with Section 15 (6) of the R.T.I Act ?
- iii) When the second respondent Commission is required to work in bench of two members, one consisting of Judicial member and one expert, whether is it proper for the first respondent not to conduct any exercise towards appointment of judicial members to the second respondent commission as mandated by the Apex Court?,
- iv) Whether the selection and appointment of Information Commissioners are based on extraneous considerations and are in colourable exercise of power?

X. THE CONSTITUTIONAL AND JUDICIAL IMPERATIVE IN ENACTING THE ACT, 2005.

40. Informed citizenry is the hallmark of participatory democracy. Participation comes into play by way of informed choice a citizen can have, and the said informed choice is possible only by exercising the right to access information regarding the institutions that go into making of

administration. When people have a right to know, the reciprocal duty is cast on the government to inform. Gone were the days when a wall of secrecy stood between the people and the government, which had a claim to many sovereign privileges. With the advent of independence, the pre-existing inalienable rights of man have come to be constitutionally consecrated as enforceable rights. As it is not a conferment, but only a cognizance, Chapter III speaks of the fundamental freedoms. It is, however, no doubt that the Constitution of India does not expressly deal with the right to information, but it is indisputably held to be a natural concomitant to the right to freedom of speech and expression guaranteed under Article 19 of the Constitution, for without a right to know, speech or expression lacks both coherence and content, remaining a mere ramble. Read with Article 19, the all-pervasive Article 21 gives form and force to the right to know *qua* right to information.

41. What is hazy or nebulous has been articulated into a right of reckoning by a series of judicial pronouncements by the Apex Court, perhaps, beginning with *Romesh Thappar v. State of Madras*², wherein it was observed:

“[T]here can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation. “Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value”

42. It was followed by *Bennett Coleman & Co. v. Union of India*³:

“139. The affirmative obligation of the Government to permit the import of newsprint by expending foreign exchange in that behalf is not only because press has a fundamental right to express itself, *but also because the community has a right to be supplied with information and the Government a duty to educate the people within the limits of its resources...* A claim to enlarge the volume of speech by diminishing the circulation raises the problem of reconciling the citizens' right to unfettered exercise of speech in volume *with the community's*

² 1950 AIR 124

³ AIR 1973 SC 106. at page 144

right to undiminished circulation. Both rights fall within the ambit of the concept of freedom of speech as explained above.”

(emphasis added)

43. It is to be observed that the Hon'ble Supreme Court for the first time has given impetus to not only the right to express, but also the right of the community to hear, to know. Soon followed *State of U.P. v. Raj Narain*⁴, wherein it is emphatically declared to the effect:

“74. In-a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. *The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security...*”

44. In *Maneka Gandhi v. Union of India*⁵, the Apex Court has deprecated the revelling in secrecy by the government. In *S. P. Gupta v. Union of India* (AIR 1982 SC 149), the call for right to information has been made amply loud and clear:

63. Now it is obvious from the Constitution that we have adopted a democratic form of Government. Where a society has chosen to accept democracy as its creedal faith, *it is elementary that the citizens ought to know what their government is doing.* The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. *No democratic government can survive without, accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy.*

...

There can be little doubt that exposure to public gaze and scrutiny is one of the surest means of achieving a clean and healthy administration. It has been truly said that an

open government is clean government and a powerful safeguard against political and administrative aberration and inefficiency.”

(emphasis added)

45. Yet again in *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd.*⁶, the Hon'ble Supreme Court has once again visited the issue, bringing it within the ambit of Art.21, and stated in para 35:

“Right to know is a basic right which citizens of a free country aspire in the broaden horizon of the right to live in this age on our land under Art. 21 of our Constitution. That right has reached new dimensions and urgency. That right, puts greater responsibility upon those, who take upon the responsibility to inform.”

46. In *Re : Harijai Singh* (AIR 1997 SC 73), it is further held:

“9. ... In a democratic set-up, there has to be an active and intelligent participation of the people in all spheres and affairs of their community, as well as, the State. It is their right to be kept informed about current political, social, economic and cultural life as well as the burning topics and important issues of the day in order to enable them to consider and form broad opinion about the same and the way in which they are being managed, tackled and administered by the Government and its functionaries...”

47. In *Dinesh Trivedi v. Union of India*⁷:

“16. In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare.

...

19. What then is the test? To ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the Government and the basis thereof. Democracy, therefore, expects openness and openness is a concomitant of a free society...”

49. In the same vein, the Supreme Court has held in *Union of India v. Assn. for Democratic Reforms*⁸, that the right to get information in democracy is recognised all throughout and it is a natural right flowing

from the concept of democracy. Encapsulating all the above pronouncements, it may be stated that in *People's Union for Civil Liberties (PUCL) v. Union of India*⁹, at page 438, the Apex Court has eloquently declared:

“Firstly, it should be properly understood that the fundamental rights enshrined in the Constitution such as, right to equality and freedoms have no fixed contents. From time to time, this Court has filled in the skeleton with soul and blood and made it vibrant. Since the last more than 50 years, this Court has interpreted Articles 14, 19 and 21 and given meaning and colour so that the nation can have a truly republic democratic society.”¹⁰

XI. THE SCHEME OF THE STATUTORY PROVISIONS:

50. We may safely conclude that the RTI Act, 2005 has given a statutory recognition to what is inherent in the constitutional dispensation concerning the right to know as a fundamental right. In the Statement of Objects and Reasons to the enactment, it has been declared that the proposed legislation will provide an effective framework for effectuating the right of information recognized under Article 19 of the Constitution of India.

51. Now, if we appreciated the provisions of the Act, Section 2 thereof, being a lexical provision, defines the State Information Commission in Clause (k) of the said Section as being the State Information Commission constituted under sub Section 1 of Section 15 of the Act; in Clause (l) State Chief Information Commissioner and State Information Commissioner are defined as being those authorities, who are appointed in sub Section (3) of Section 15 of the Act; and in Clause (m), State Public Information Officer is defined as being the office of the designated under sub Section

(1) of Section 15, including the State Assistant Public Information Officer designated as such under sub-Section (2) of Section 15.

52. Section 6 of the Act provides for making an application by the person, who desires to obtain any information under this Act. In fact disposal of the request is made time bound in terms of Section 7 of the Act. As per sub-Section (8) of Section 7, where a request has been rejected under sub section (1), the State Public Information Officer shall communicate to the person making the request, the reason for such rejection, the period within which an appeal against such rejection may be preferred, and the particulars of the appellate authority. Leaving aside, the exemptions from disclosure of information as contained in Section 8 and grounds for rejection to access of information in certain cases, we may state that section 19 of the Act provides for the remedial mechanism in the form of appeal.

53. For our purpose chapter (IV) of the Act bears importance. Section 15 of the Act in the said chapter contains the procedural parameters for the appointment of the State Information Commissioners. Since the entire case reveals on this particular provision, it is profitable to extract the same:

15. Constitution of State Information Commission.—(1) Every State Government shall, by notification in the Official Gazette, constitute a body to be known as the (name of the State) Information Commission to exercise the powers conferred on, and to perform the functions assigned to, it under this Act.

(2) The State Information Commission shall consist of—

(a) the State Chief Information Commissioner, and

(b) such number of State Information Commissioners, not exceeding ten, as may be deemed necessary.

(3) The State Chief Information Commissioner and the State Information Commissioners shall be appointed by the Governor on the recommendation of a committee consisting of—

- (i) the Chief Minister, who shall be the Chairperson of the committee;
- (ii) the Leader of Opposition in the Legislative Assembly; and
- (iii) a Cabinet Minister to be nominated by the Chief Minister.

Explanation.—For the purposes of removal of doubts, it is hereby declared that where the Leader of Opposition in the Legislative Assembly has not been recognized as such, the Leader of the single largest group in opposition of the Government in the Legislative Assembly shall be deemed to be the Leader of Opposition.

(4) The general superintendence, direction and management of the affairs of the State Information Commission shall vest in the State Chief Information Commissioner who shall be assisted by the State Information Commissioners and may exercise all such powers and do all such acts and things which may be exercised or done by the State Information Commission autonomously without being subjected to directions by any other authority under this Act.

(5) *The State Chief Information Commissioner and the State Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.*

(6) *The State Chief Information Commissioner or a State Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.*

(emphasis added)

54. Section 16 prescribes the term of office and conditions of the Information Commissioners including the State Chief Information Commissioner. On the other hand, Section 17 prescribes the procedure for the removal of State Chief Information Commissioner' or State Information Commissioner.

XII. ANSWERING OF THE ISSUES:

55. The first issue to be answered is whether the selection and appointment of Information Commissioners without advertisement and without preparation of panels are bad. Without indulging in any further ratiocination on the issue, it is apt to refer to what has been held by the

Apex Court in *Namit Sharma (2)* in this regard. In fact, in *Namit Sharma (1)*, the Court has "read into" Sections 12(5) and 15(5) of the Act what are termed as missing words. But in review (*Namit Sharma (2)*), the Apex Court has acknowledged that this "reading into" the provisions of Sections 12(5) and 15(5) of the Act, words which Parliament has not intended is *contrary* to the principles of statutory interpretation recognised by the Court. Accordingly, in *Namit Sharma (2)*, the directive of that the panel has to be prepared upon *due advertisement*, which finds place in *Namit Sharma (1)*, has not been reiterated. *Ipsso facto*, this contention of the petitioners shall fail.

56. The second issue to be answered is whether the appointment of the respondent Nos. 3 to 6, who are allegedly connected with a certain political party, is not in accordance with Section 15 (6) of the R.T.I Act. In *Namit Sharma (2)*, it has been held:

"We declare that Sections 12(6) and 15(6) of the Act do not debar a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or a person holding any other office of profit or connected with any political party or carrying on any business or pursuing any profession from being considered for appointment as Chief Information Commissioner or Information Commissioner, but after such person is appointed as Chief Information Commissioner or Information Commissioner, he has to discontinue as Member of Parliament or Member of the Legislature of any State or Union Territory, or discontinue to hold any other office of profit or remain connected with any political party or carry on any business or pursue any profession during the period he functions as Chief Information Commissioner or Information Commissioner."

57. It is made abundantly clear that only after the person is appointed as Chief Information Commissioner or Information Commissioner, he has to discontinue as Member of Parliament, etc., or discontinue to hold any other office of profit or remain connected with any political party or carry on any business or pursue any profession.

58. The third issue to be answered as whether it is proper for the first respondent not to conduct any exercise towards appointment of judicial members to the second respondent commission when the second respondent Commission is required to work in bench of two members, one consisting of Judicial member and one expert. In this regard the Apex Court has held in *Namit Sharma* (2):

“While deciding whether a citizen should or should not get a particular information “which is held by or under the control of any public authority”, the Information Commission does not decide a dispute between two or more parties concerning their legal rights other than their right to get information in possession of a public authority. This function obviously is not a judicial function, but an administrative function conferred by the Act on the Information Commissions.”

It is further held:

The decision taken by the Central Public Information Officer or the State Public Information Officer, as the case may be, under Section 11 of the Act is appealable under Section 19 of the Act before the Information Commission and when the Information Commission decides such an appeal, it decides only whether or not the information should be furnished to the citizen in view of the objection of the third party. Here also the Information Commission does not decide the rights of a third party but only whether the information which is held by or under the control of a public authority in relation to or supplied by that third party could be furnished to a citizen under the provisions of the Act. Hence, the Information Commission discharges administrative functions, not judicial functions.”

Further reference may also be made to the observations of the Hon'ble Supreme Court:

“Once the Court is clear that Information Commissions do not exercise judicial powers and actually discharge administrative functions, the Court cannot rely on the constitutional principles of separation of powers and independence of judiciary to direct that Information Commissions must be manned by persons with judicial training, experience and acumen or former Judges of the High Court or the Supreme Court.”

59. The Fourth issue to be answered is whether the selection and appointment of Information Commissioners are based on extraneous

considerations and are in colourable exercise of power. Regrettably, the petitioners have used these expressions without laying any foundation to justify the use. Extraneous consideration is a matter of mala fide exercise of power and colourable exercise of power is a question of lack of power. They both are, in a sense, mutually exclusive. We may profitably refer to *STO v. Ajit Mills Ltd.*,¹¹ in which, the Hon'ble Supreme Court, speaking through the inimitable V. R. Krishna Iyer, J, has defined the contours of the 'colourable exercise of power', in the following words:

"16. Before scanning the decisions to discover the principle laid down therein, we may dispose of the contention which has appealed to the High Court based on 'colourable device'. Certainly, this is a malignant expression and when flung with fatal effect at a representative instrumentality like the legislature, deserves serious reflection. If, forgetting comity, the Legislative wing charges the Judicature wing with "colourable" judgments, it will be intolerably subversive of the rule of law. Therefore, we too must restrain ourselves from making this charge except in absolutely plain cases and pause to understand the import of the doctrine of colourable exercise of public power, especially legislative power. In this branch of law, "colourable" is not "tainted with bad faith or evil motive" ; it is not pejorative or crooked. *Conceptually, "colourability" is bound up with incompetency.* "Colour", according to Black's Legal Dictionary, is "an appearance, semblance or *simulacrum*, as distinguished from that which is real ... a deceptive appearance ... a lack of reality". A thing is colourable which is, in appearance only and not in reality, what it purports to be. In Indian terms, it is *maya*. In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution, are expressions which merely mean *that the legislature is incompetent to enact a particular law although the label of competency is stuck on it*, and then it is colourable legislation. *It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant.*"

(emphasis added)

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60. Insofar as the allegation of extraneous consideration is concerned, it is apt to recall what is stated by the House of Lords in *The Queen v. Cotham And Another*¹²:

“When it is demonstrated, as it is here, that they granted a licence in respect of a place which was not an inn, and had not theretofore been kept as an inn, and from which there was no person who had kept it about to remove, *it is plain that they cannot have decided according to law; they must have acted upon some extraneous consideration not warranted by the statute. It is not a question of a misconstruction of the statute.* No construction can alter the plain words of the Act, or make the premises in question premises theretofore kept as an inn, or Wallace a person about to remove from them. It is a case in which the justices have so far departed from the plain words of the Act — deciding upon some extraneous consideration, I know not what — that they cannot be said to have heard and determined according to law. Under those circumstances I have no doubt that a mandamus is the proper remedy.”

61. Sadly, the petitioners have not brought home any material to demonstrate that there has been any extraneous consideration in the appointment of the respondent Nos.3 to 6 as ICs. It is axiomatic to state that when *mala fides* are attributed, the task of the petitioners is Herculean in establishing the same. Suffice it to say that the petitioners have not travelled beyond their own *ipse dixit*.

62. We may sigh off, observing that in *Namit Sharma (2)*, the Hon'ble Supreme Court has not given a *carte blanche* to the executive in appointing the Chief Information Commissioner or Information Commissioners; but, on the contrary, has made it clear that in every appointment the constitutional spirit and the functional efficacy of the RTI Act, 2005 pervades and permeates.

63. In the light of the above discussion, we find that the PIL is without merits and deserves to be dismissed. Accordingly, we dismiss the same. No order as to costs.